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# United States Court of the District Courts

February 1940

UNITED STATES OF AMERICA, APPELLANT

WILLIAM E. BURNHAM, ET AL.

UNITED STATES OF AMERICA, APPELLANT

WILLIAM JOHN HANCOCK, ET AL.

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA AND THE WESTERN  
DISTRICT OF VIRGINIA

UNITED STATES DISTRICT COURT AS OFFICE CUMAS IN  
DISTRICT OF COLUMBIA

JOHN W. HANCOCK, Counsel at Law,  
James Legal Counsel,  
JAMES S. HANCOCK, JR.,  
James Legal Counsel,  
WILLIAM A. HANCOCK,  
James Legal Counsel,  
CLARENCE H. HANCOCK,  
James Legal Counsel,  
222 West State Office Building,  
Washington, D.C. 20510  
222 222-1111

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\*Material lodged with the Clerk of the Supreme Court.

**In the Supreme Court of the United States**

OCTOBER TERM, 1989

No. 89-1433 AND No. 89-1434

UNITED STATES OF AMERICA, APPELLANT

*v.*

SHAWN E. EICHMAN, ET AL.

UNITED STATES OF AMERICA, APPELLANT

*v.*

MARK JOHN HAGGERTY, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURTS FOR THE  
DISTRICT OF COLUMBIA AND THE WESTERN DISTRICT OF  
WASHINGTON

BRIEF OF THE UNITED STATES SENATE AS AMICUS CURIAE IN  
SUPPORT OF APPELLANT

**INTEREST OF THE UNITED STATES SENATE**

These cases present to the Court a question about the constitutionality of 18 U.S.C. § 700, as amended by the Flag Protection Act of 1989, Pub. L. No. 101-131, § 2(a), 103 Stat. 777, and as applied to persons who knowingly burned flags of the United States. The Senate's interest in these cases is grounded in its commitment to protect the physical integrity of the flag, and in its conviction that the Act is a faithful and constitutional response to this Court's decision in *Texas v. Johnson*, 109 S.Ct. 2533

(1989). Accordingly, the Senate has authorized the filing of this brief pursuant to 2 U.S.C. § 288e(a), which provides that the Senate may direct its Legal Counsel to appear as *amicus curiae* in its name "in any court of the United States . . . in which the powers and responsibilities of Congress under the Constitution of the United States are placed in issue."<sup>1</sup>

### SUMMARY OF ARGUMENT

The Congress was asked as early as 1878 to adopt legislation to protect the flag. The history of flag legislation since that time helps to illuminate the understanding that citizens and legislators have had about the interests that such protective legislation is intended to serve. It also demonstrates the persistent determination of the Congress, the states, and those who have petitioned them for legislation, neither to favor nor to disserve any group or point of view in the course of protecting the flag, and their concern, which has been sharpened over time, to assure that protection of the flag from mutilation does not trench upon the opportunity of all citizens to exercise their right to speak against their government or their flag.

1. The first legislative proposals, starting in 1878 and continuing into 1896, were directed at the use of the flag on commercial products and in advertising. One hundred years ago, the House Committee on the Judiciary, in describing why it should be an offense "to deface, disfigure, or prostitute [the flag] to the purposes of advertising," described the significance of the flag in terms applicable then and now: "The flag of our country is the symbol of our national existence, power, and sovereignty. It is the emblem of freedom and equality and representative of

<sup>1</sup> See S. Res. 213, 101st Cong., 1st Sess. (1989), 135 Cong. Rec. S16191-92 (daily ed. Nov. 19, 1989) (directing appearance in *United States v. Eichman*); S. Res. 234, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. S441 (daily ed. Jan. 25, 1990) (directing appearance in *United States v. Hagerty*). Permission for the Senate to appear is "of right" and may be denied only for untimeliness. 2 U.S.C. § 288f(a).

the glory of the American name. It is a reminder of American fortitude, courage, and heroism; and of the suffering and sacrifices on land and sea which have been endured for its preservation and for the preservation of the country it represents." H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890). However, the objection was heard in Congress that the Democratic and Republican parties would not accept any restriction on the use of flags for political advertisements by the painting or printing of the names of candidates and campaign slogans on flags, as was prevalent at the time, and the proposals did not become law.

2. In 1896, concern about the misuse of the flag in advertising was joined by alarm over the physical harm to the flag that occurred during the McKinley-Bryan presidential campaign when partisans of both candidates ripped down and trampled upon each other's flags. A large number of petitions were submitted to Congress requesting a flag desecration law, but it was the states, beginning with Pennsylvania, that acted first to prohibit both the use of flags in advertising and their mutilation. A petition to Congress from Illinois made clear that the purpose of a proposed flag law was "NOT to make our citizens loyal," but "TO REGULATE the actions of those who without a disloyal thought" desecrate the flag.

3. Although a number of states in the immediate aftermath of the 1896 campaign passed laws which, apart from prohibitions on use of the flag in advertising, were limited to physical attacks on the flag, the American Flag Association, formed in 1897 to promote flag legislation, circulated in 1900 a model law that also would make it an offense to "defy" or "cast contempt, either by words or acts," upon the flag. When the Congress enacted in 1917 a flag desecration law for the District of Columbia, it adopted the broad formulation proposed by the Flag Association, as did the Commissioners on Uniform State Laws in promulgating a uniform flag law that year.

4. As the United States' entry into World War II approached, the Congress considered the adoption of nation-

wide flag desecration legislation. In response to a request for his views, Attorney General Robert H. Jackson stated that "[l]egislation on the subject appears to be desirable. . . . I find no objection to the enactment of the bill." S. Rep. No. 130, 77th Cong., 1st Sess. 2 (1941) (reprinting letter). While the Congress did not adopt a nationwide flag desecration law, it did adopt in 1942 a recommendatory code on flag observances. In *West Virginia State Board of Education v. Barnette*, this Court took note of "[t]he action of Congress in making flag observance voluntary." 319 U.S. 624, 638 (1943).

5. Partly out of concern about the impact of flag burnings on the morale of American troops in Vietnam, the Congress enacted a nationwide flag desecration statute in 1968. Starting with the legislation that it had enacted for the District of Columbia in 1917, but accepting Attorney General Ramsey Clark's advice that "[p]articular care should be exercised to avoid infringement of free speech," S. Rep. No. 1287, 90th Cong., 1st Sess. 5 (1968), the Congress excised prohibitions on defying the flag or casting contempt on it by word or act. Between 1969 and 1974, this Court overturned convictions under three state flag laws that made it an offense to cast contempt on the flag by words, contained a vague proscription on the contemptuous treatment of the flag, or permitted conviction for affixing a peace symbol to a flag in a manner that did not harm the flag. None of the problems identified by the Court in those cases existed in the federal statute which had been enacted in 1968. Shortly thereafter, the Court let stand convictions that were based only on the physical destruction of flags.

6. In 1973, Texas replaced a flag law that was similar to other state flag laws, and adopted a statute that had been suggested in a draft of the American Law Institute's Model Penal Code. In *Texas v. Johnson*, this Court concluded that "[t]he Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impair-

ments that would cause serious offense to others." 109 S.Ct. at 2543. The Flag Protection Act was accordingly designed to assure that federal law complied with that ruling by making the regulation "'content neutral.' It is the act of harming the physical integrity of the flag, rather than any message the actor might be attempting to convey, that is to be punished. . . ." 135 Cong. Rec. H6991 (daily ed. Oct. 12, 1989) (Rep. Brooks).

7. Thus, for nearly a century the destruction of the United States flag has been viewed as conduct that causes serious harm to the nation. The Flag Protection Act of 1989 should be assessed in the context of its predecessor enactments and the objectives of the successful movement for flag protection legislation in the states at the turn of the century. That movement, which was spurred in 1896 by political violence in which Democrats and Republicans trampled each other's flags or shot at them, was not directed at suppressing political dissent. The strength of the government's interest in preserving the flag as a national symbol is demonstrated by the sustained effort by the states and the Congress to protect the flag from mutilation and destruction. As Attorney General Clark advised during consideration of the 1968 flag law, whether a federal criminal remedy is the proper redress for the injury that is inflicted on the nation when the flag is burned is properly a question for the Congress. In enacting a statute that is limited to the protection of the physical integrity of the flag in all circumstances, Congress has crafted a remedy that is respectful of first amendment values.

## ARGUMENT

### **The Century-Long History of Flag Protection Legislation in This Country Aids in Demonstrating that the Flag Protection Act of 1989 Serves an Important Public Purpose in a Neutral Manner That is Respectful of the First Amendment**

This brief is submitted for the Court's consideration in conjunction with the briefs of appellant and other amici who are providing to the Court full doctrinal arguments in support of the constitutionality of the Flag Protection Act of 1989. Its principal and narrower objective is to show that the Act's purpose—to protect the physical integrity of the flag without regard to any message that individuals may seek to convey through their use of it—is demonstrated not only by the statute's text but by the history of flag legislation since the Congress was first asked in the late 1800s to enact protective measures. The initial flag protection legislation proposed in the Congress primarily addressed concerns over the increased use of the flag in advertising, but no legislation was enacted until incidents involving destruction of the flag during the 1896 presidential campaign galvanized public reaction. In the decades that followed, state after state and then the federal government acted to prevent both the use of the flag in advertising and physical assaults on it. The Flag Protection Act of 1989 is the direct outgrowth, carefully pruned to eliminate excesses which this Court and others have identified, of this sustained nationwide determination to preserve the flag's value as the nation's salient symbol. The century-old history of flag legislation, which will be recounted below, amply shows that the Act is directed at that end and not at suppressing particular ideas.

#### **1. BETWEEN 1878 AND 1896 THE CONGRESS CONSIDERED BUT DID NOT ENACT LEGISLATION DIRECTED SOLELY AT THE USE OF THE FLAG IN ADVERTISING**

Flag protection legislation was proposed in the Congress as early as 1878. Concerned with the effects of an

increasingly commercialized society on the nation's flag, the public appealed to the Congress to prohibit the widespread use of the flag in advertising. An 1895 petition, one of many the Congress received on the flag, explained that commercial use of the flag was not viewed as "in the nature of an intended disrespect" but rather as "abuse[ ] with which everyone is familiar, but the evil of which few have appreciated."<sup>2</sup> "[I]f the flag is to be held in any degree of veneration," the petition advised the Congress, "it must not be made familiar to the sight as a medium of advertising."<sup>3</sup>

It appears that the first bill "[t]o prevent the desecration of the United States flag" was offered in 1878 by Representative Samuel S. Cox of New York. The bill provided for a fine of up to fifty dollars or imprisonment of not less than thirty days for anyone "who shall disfigure the national flag, either by printing on said flag, or attaching to the same, or otherwise, any advertisement for public display. . . ." <sup>4</sup> Reporting a nearly identical bill that passed the House in 1890, the Committee on the Judiciary justified the proposed law on grounds which have endured as a basis for flag legislation:

The flag of our country is the symbol of our national existence, power, and sovereignty. It is the emblem of freedom and equality and representative of the glory of the American name. It is a reminder of American fortitude, courage, and heroism, and of the suffering and sacrifices on land and sea which have been endured for its preservation

<sup>2</sup> National Flag Committee of the Society of Colonial Wars in the State of Illinois, *The Misuse of the National Flag of the United States of America* 15 (1895) (on file at the National Archives). The receipt of this petition was noted, together with several other "petitions of citizens of the United States, praying the passage of a law to prevent the desecration of the American flag," in the Journal of the Senate, 54th Cong., 1st Sess. 18 (1895).

<sup>3</sup> Petition of Society of Colonial Wars, *supra* n.2, at 21 (quoting editorial).

<sup>4</sup> H.R. 4305, 45th Cong., 2d Sess. (1878). A similar bill was introduced in the next Congress. H.R. 3153, 46th Cong., 2d Sess. (1880).

and for the preservation of the country it represents. . . . It should be held a thing sacred, and to deface, disfigure, or prostitute it to the purposes of advertising should be held to be a crime against the nation.

H.R. Rep. No. 2128, 51st Cong., 1st Sess. 1 (1890).<sup>5</sup>

Throughout the next several Congresses, more bills to bar the use of the flag in commercial advertisements were introduced, but none was enacted.<sup>6</sup> A number of these proposals would have proscribed any advertisement on flags "for public display," as well as for "private gain." *E.g.*, S. 1012, 54th Cong., 1st Sess. (1895) (as introduced). These proposals elicited a concern by some members of the Congress that the legislation might be read to "prevent the use of the flag as an advertisement by any political party." 23 Cong. Rec. 5188 (1892) (Rep. Caruth). Addressing the practice, popular since the presidential campaign of 1840, of printing or painting political slogans and the images of political candidates on flags,<sup>7</sup> members derided any thought of "prevent[ing] our Republican friends from advertising 'Blaine and Reciprocity' on the flag, or our Democratic friends from blazoning upon it 'Cleveland and Free Silver.'" <sup>8</sup> In accord with those views in 1896 the Committee on the Judiciary reported an amendment to a flag advertising bill that limited its proscription to "goods, wares, or merchandise." S. 1012, 54th Cong., 1st Sess. (1896) (as reported). The Chairman of the Committee, Senator George F. Hoar, commented that,

<sup>5</sup> See 21 Cong. Rec. 10697 (1890) (House passage).

<sup>6</sup> See, *e.g.*, H.R. Rep. No. 541, 52d Cong., 1st Sess. (1892) (reporting H.R. 335); H.R. Rep. No. 677, 53d Cong., 2d Sess. 1 (1894) (reporting H.R. 5315).

<sup>7</sup> See H. Collins, *Threads of History* 102-05 (1979).

<sup>8</sup> 23 Cong. Rec. 5188 (1892) (Rep. Kilgore). Members of the House may have been mindful that in the same Congress Senator John Sherman had introduced a measure to prohibit printing or painting on flags "the motto of any political party, or the name of the candidate of any political party for any office." S. 853, § 2, 52d Cong., 1st Sess. (1891).

"I am afraid that the great political parties of the country would not consent that the practice of hanging out the Flag with the names of the candidates attached should be abandoned." <sup>9</sup>

## 2. PHYSICAL ASSAULTS ON FLAGS DURING THE 1896 PRESIDENTIAL CAMPAIGN LED TO A MOVEMENT TO OBTAIN STATUTORY PROTECTION FOR THE FLAG

In 1896, the concern about the use of the flag in advertising was joined by alarm over physical harm to the flag. The presidential campaign that year between William McKinley and William Jennings Bryan, coinciding with economic depression and labor and agrarian unrest, came at a particularly volatile period in American history.<sup>10</sup> When the flag was used to advertise candidates in the presidential campaign, members of both parties reacted, often violently, by tearing down those flags and trampling or otherwise mutilating them.

In protest of this treatment of the flag, a large number of petitions were submitted to Congress praying for the passage of a bill to prevent flag desecration.<sup>11</sup> The petition of the Daughters of the American Revolution described examples of assaults on the physical integrity of the flag and resulting violence during the 1896 campaign, "notices of which were wide-spread in the newspapers at the time of the occurrences." <sup>12</sup> In one instance, "A large American flag, bearing a banner with a partisan motto, the property of a citizen, was suspended across the principal street of Hammond, Ind., from a private residence. After having been repeatedly threatened, the flag was torn down in the early morning and trampled into the

<sup>9</sup> H. Baldwin, A.F. Delafield, A. Hamilton, *Report on Desecration of American Flag* 4 (1896).

<sup>10</sup> P. Glad, *McKinley, Bryan, and the People* 208 (1964).

<sup>11</sup> *E.g.*, Journal of the Senate, 55th Cong., 2d Sess. 45, 68, 80, 84, 88, 105, 108, 110, 123, 150, 152, 155, 173, 175, 192, 206, 218, 228, 284, 360 (1898).

<sup>12</sup> Petition of the Flag Committee of the National Society, Daughters of the American Revolution, Jan. 27, 1898, at 1 (on file at the National Archives).

mud." *Id.* at 2. In another, "A stranger in Council Bluffs, Iowa, rode up to a large American flag bearing a partisan banner and fired upon it with a shotgun. A soldier shot at the mounted assailant of the flag, killing the horse and wounding the man, who escaped." <sup>13</sup>

Reflecting later on how the events of 1896 triggered the call for flag legislation, the President of the American Flag Association, an organization formed in 1897 to promote legislation on flag desecration, recalled the

presidential campaign of 1896, when political rancor ran so high, and political excitement knew no bounds, . . . infuriated partisanship was manifested in tearing down the Flag, tearing it in pieces, and trampling it in the dust; when . . . political parties, each assuming that they alone represented the patriotism of the country, advertised their political candidates by attaching their names and pictures to the Flag, or writing their names upon the white stripes of the Flag; when our country was flooded with merchandise advertised by pictures of the Flag, and in some instances indelibly burned into the material of which the merchandise was made.

American Flag Association, *Fifth Circular of Information* 20-21 (1907-08) (reprinting Colonel Ralph E. Prime's 1907 address to the Association).

The concern with physical harm to the flag that grew out of the 1896 campaign was manifested in legislation proposed in the Congress in 1897. In addition to prohibiting the use of the flag in commercial and political adver-

<sup>13</sup> *Id.* The violence was not limited to flags bearing campaign messages. See, e.g., N.Y. Times, Nov. 1, 1896, at 8, col. 2 (reporting that a young girl, who was part of a McKinley delegation and was carrying a small flag while singing sound-money songs, had her flag snatched by a man carrying a Bryan banner, who then cast the flag on a fire that was burning sound-money literature); Omaha World-Herald, Nov. 1, 1896, at 3, col. 3 (reporting that during a free silver parade "the large lifesized picture of W. J. Bryan, which was carried at the head of the parade, was fired into and riddled with shot, as was also the American flag, which was carried alongside of it").

tising, H.R. 5430 would have made it a misdemeanor to "tear down, trample upon, or treat with indignity, or wantonly destroy the national flag or coat of arms of the United States." <sup>14</sup> But it was the states that first enacted legislation on flag desecration. First, Pennsylvania made it a felony to use the flag for advertising or "wilfully and maliciously [to] take down, pollute, injure, remove or in any manner damage or destroy any American flag or flagstaff which now or hereafter may be put, erected or placed on any private or public building or place." 1897 Pa. Laws 34. Then, after the Flag Association, on "[f]ailing in uniting the different interests at work with Congress . . . determined to turn its attention to State Legislation," <sup>15</sup> in a two-month period in 1899, six states—New York, New Hampshire, Maine, Massachusetts, Minnesota, and Connecticut—enacted measures to prohibit both the use of the flag in advertising and the mutilation and trampling of it. See *infra* p. 12.

From the outset, proponents of the flag legislation that emerged in response to the excesses of the 1896 campaign made clear that their purpose was "NOT to make our citizens loyal," but "TO REGULATE the actions of those who without a disloyal thought, unthinkingly, turn our national flag into street awnings, advertising signs of all descriptions, pull down or shoot at it when bearing the names of opposing political parties. . . ." <sup>16</sup> They also made clear that they sought to restrain misuse of the flag by anyone, including members of the major political parties. In the words of a Connecticut state senator that were widely disseminated by the Flag Association, the purpose of flag protection legislation was "to keep our

<sup>14</sup> H.R. 5430, 55th Cong., 2d Sess. (1897). See also H.R. 5491, 55th Cong., 2d Sess. (1898); S. 3100, 55th Cong., 2d Sess. (1898); S. 3174, 55th Cong., 2d Sess. (1898); H.R. 10999, 55th Cong., 3d Sess. (1898).

<sup>15</sup> American Flag Association, *Circular of Information* 8 (1900) [hereinafter "1900 Circular"].

<sup>16</sup> Petition of the Illinois Society of the Sons of the American Revolution and Society of Colonial Wars, in the State of Illinois, Mar. 21, 1898, at 1 (emphasis in original) (on file at the National Archives).

flag sacred and free from any alteration or desecration whatever. We don't want any Presidential candidate or political party to use it or alter it in any way." *1900 Circular*, *supra* n.15, at 16.

3. THE AMERICAN FLAG ASSOCIATION'S CAMPAIGN TO PROVIDE BROADER PROTECTION FOR THE FLAG ACHIEVED CONSIDERABLE SUCCESS IN THE STATES AND FINALLY IN THE CONGRESS, IN 1917, WITH THE ENACTMENT OF A FLAG DESECRATION LAW FOR THE DISTRICT OF COLUMBIA

In 1900, the American Flag Association circulated a model law for use by its constituent committees in advocating the passage of flag laws in their respective states.<sup>17</sup> In drafting the model law, the Flag Association made an influential determination about the scope of flag protection legislation. Of the ten states that had adopted flag laws by 1900, seven had prohibited the mutilation of the flag in addition to prohibiting the use of the flag in advertising. Three of those states—Connecticut, Maine, and New Hampshire—had limited their statutes to the physical protection of the flag.<sup>18</sup> A fourth state, Pennsylvania, had prohibited specified conduct, the malicious taking down or removing of flags, in addition to damaging or destroying them. *See supra* p. 11. Three other states—New York, Minnesota, and Massachusetts—had introduced elements, namely, "defying" the flag or "treating [it] contemptuously," that may have included undefined conduct or speech about the flag.<sup>19</sup> Taking this

<sup>17</sup> *1900 Circular*, *supra* n.15, at 19-20.

<sup>18</sup> 1899 N.H. Laws 302-03 (applicable to anyone "who publicly mutilates, tramples upon, or defiles any of said flags"); 1899 Me. Laws 147 (applicable to anyone "who in any manner mutilates, tramples upon or otherwise defaces or defiles any of said flags"); 1899 Conn. Pub. Acts 1014 (applicable to anyone "who publicly mutilates, tramples upon, or otherwise defaces or defiles any of said flags").

<sup>19</sup> 1899 N.Y. Laws 17-18 (applicable to anyone "who publicly mutilates, tramples upon or otherwise defaces or defies any of said flags"); 1899 Minn. Laws 169 (same); 1899 Mass. Acts 225 (applicable to "[w]hoever publicly mutilates, tramples upon, defaces, or treats contemptuously any of said flags"). The "treats contemptuously" language of the 1899 Massachusetts law was the subject of *Smith v. Goguen*, 415 U.S. 566 (1974).

broader approach, the Flag Association recommended that states enact a flag law that would apply to anyone who shall "publicly mutilate, trample upon or publicly deface, or defy, or defile, or cast contempt, either by words or act, upon any such flag" of the United States. *1900 Circular*, *supra* n.15, at 20, § 1. The impact of the Flag Association proposal became quickly evident when four states—Oregon, Indiana, Wisconsin, and Michigan—adopted in 1901 flag desecration bills that included a prohibition on defiance of the flag, as well as the casting of contempt upon it by words or act.<sup>20</sup>

While the Flag Association was achieving success in obtaining state laws, the effort to obtain federal flag legislation was renewed,<sup>21</sup> in part because of a restrictive court ruling on a state flag statute. Testifying in 1902 that nineteen states had adopted legislation to prevent flag desecration, the Flag Association brought to the Congress's attention a decision of the Illinois Supreme Court, in *Ruhstrat v. People*, 185 Ill. 133, 57 N.E. 41 (1900), that erected an impediment to those state enactments. The Illinois court had held that a state statute prohibiting use of the flag for advertisements violated state and federal constitutional guarantees of personal liberty and deprived citizens of the United States of the federal privilege of using the flag as a trademark. In reaching that conclusion, the court observed that the Congress, which had exercised "its inherent power to establish a flag or emblem symbolic of national sovereignty," had "passed no legislation restricting the use of the flag." *Id.* at 146, 57 N.E. at 45. The use of the flag in advertising and as a trademark had received, in the court's estimation, "the sanction of

<sup>20</sup> 1901 Or. Laws 286-87 (adopting Flag Association proposal); 1901 Ind. Acts 351-53 (same); 1901 Wis. Laws 173-75 (same); 1901 Mich. Pub. Acts 139-40 (same).

<sup>21</sup> In 1901 and 1902, numerous bills to prevent the desecration of the flag were introduced in the Congress and the first hearings on the subject were held. *See Hearing on Bills to Prevent the Desecration of the American Flag Before the Senate Comm. on Military Affairs*, S. Doc. No. 229, 57th Cong., 1st Sess. (1902).

those having in charge the execution of the trade-mark laws of the United States." *Id.*

In 1905 the Congress removed the obstacle to state protection of the flag that had been created by the Illinois decision. In its revision of the trademark laws that year, the Congress provided that registration of a mark could be refused if it "consists of or comprises the flag or coat of arms or other insignia of the United States, or any simulation thereof, or of any State or municipality, or of any foreign nation."<sup>22</sup> This provision reflected the judgment that the flag was not a design that should "become the exclusive property of the party using the same as his trade-mark." H.R. Rep. No. 3147, 58th Cong., 3d Sess. 7 (1904). The provision thus codified the emerging policy of the United States Patent Office to deny trademarks for designs that incorporated the national flag, emblem, or colors because "[i]t is contrary to public policy to detract in any way from the honor which is due to the flag."<sup>23</sup>

Two years later, this Court upheld in *Halter v. Nebraska*, 205 U.S. 34 (1907), the constitutionality of a Nebraska prohibition on the use of the flag in advertising. The 1905 trademark law had eliminated the argument on which the Illinois Supreme Court in *Ruhstrat* had based its invalidation of a similar Illinois law, and the Court simply noted its enactment. *Id.* at 39. The Court observed that more than half of the states had adopted statutes similar to Nebraska's, and "[t]hat fact is one of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States."<sup>24</sup> The statute, the Court held, served a legitimate public purpose because the use of the flag in advertising "tends to

<sup>22</sup> Act of February 20, 1905, ch. 592, § 5, 33 Stat. 724, 725 (codified at 15 U.S.C. § 1052(b) (1988)).

<sup>23</sup> *Ex parte Ball*, 98 O.G., 2366 (1902), reprinted in H.R. Doc. No. 460, 57th Cong., 2d Sess. 102, 103 (1902).

<sup>24</sup> *Id.* at 40; See also *id.* at 39 n.1 (collecting citations to statutes in thirty states).

degrade and cheapen the flag in the estimation of the people, as well as to defeat the object of maintaining it as an emblem of National power and National honor." *Id.* at 42.

With the constitutionality of state flag protection laws supported, the Commissioners on Uniform State Laws appointed a committee in 1912 to consider a uniform law to prohibit the desecration of the American flag. The committee's report to the commissioners the following year recounted how flag protection legislation "arose from the condition of things in 1896," referring both to the use of the flag in advertising and to the incidents in that year's campaign in which the flag "was torn down and torn in pieces and trampled in the dust."<sup>25</sup> The commissioners adopted a uniform flag law in 1917, which the American Bar Association approved in 1918 and recommended for passage by the states.<sup>26</sup> With only a slight rearrangement of terms, the mutilation provision of the 1917 uniform act was taken verbatim from the American Flag Association's 1900 proposal.<sup>27</sup>

In the meantime, the American Flag Association had not abandoned its federal legislative effort entirely, and urged the Congress to enact a flag desecration law at least for the District of Columbia. 54 Cong. Rec. 1728 (1917) (Sen. Pomerene). In early 1917, the Congress did so, enacting flag legislation for the District that mirrored the model law the American Flag Association had circulated in 1900.<sup>28</sup> Described on the Senate floor as "very compre-

<sup>25</sup> Report of the Special Committee on the Matter of a Uniform Law for the Protection of the Flag of the United States, reprinted in the Proceedings of the Twenty-Third Annual Conference of Commissioners on Uniform State Laws 157-58 (1913). That history is also recounted in the Commissioners' Prefatory Note to the Uniform Flag Act, 9B U.L.A. 48 (1966).

<sup>26</sup> Report of the Forty-First Annual Meeting of the American Bar Association 82 (1918).

<sup>27</sup> Compare 9B Unif. Flag Act, § 3, 9B U.L.A. 52 (1966) with 1900 Circular, *supra* n.15, at 20.

<sup>28</sup> See Act of February 8, 1917, ch. 34, 39 Stat. 900 (codified as amended at 4 U.S.C. § 3 (1988)).

hensive," 54 Cong. Rec. 1728 (1917) (Sen. Pomerene), the measure, in addition to prohibiting the placing of words, pictures, or any advertisements on any flag of the United States, made it a misdemeanor to "publicly mutilate, deface, defile or defy, trample upon or cast contempt, either by word or act" any flag of the United States, which the act defined broadly to include "any picture or representation" which the average person would believe to "represent the flag."<sup>29</sup>

#### 4. THE CONGRESS'S ACTIONS DURING THE SECOND WORLD WAR REFLECT ITS DETERMINATION NOT TO COMPEL WORDS OR CEREMONIES OF LOYALTY TO THE FLAG

As American participation in the Second World War drew close, interest in national flag legislation was renewed. In response to a request from the Chairman of the Senate Committee on the Judiciary for his views on a bill to prevent the desecration and mutilation of the flag, Attorney General Robert H. Jackson responded that "[l]egislation on the subject appears to be desirable."<sup>30</sup> Suggesting that the "best approach . . . would be to extend the existing law relating to the District of Columbia to the rest of the United States," the Attorney General concluded that, "I find no objection to the enactment of the bill." *Id.* Adopting the Attorney General's suggestion, the Senate passed bills in 1941 and 1943 to prevent the desecration of the flag, but the House did not act on them.<sup>31</sup>

<sup>29</sup> 39 Stat. 900. Although there was some suggestion that the legislation should extend to the entire United States, the existence of state legislation on the subject was perceived as diminishing the need for national legislation, which if necessary, could "be brought in at a later day." 54 Cong. Rec. 1728 (Sen. Pomerene).

<sup>30</sup> S. Rep. No. 130, 77th Cong., 1st Sess. 2 (1941) (reprinting excerpts from March 5, 1941 letter from Attorney General Robert H. Jackson). The full letter from the Attorney General is on file at the National Archives.

<sup>31</sup> S. 218, 77th Cong., 1st Sess. (1941); 87 Cong. Rec. 3044 (1941) (Senate passage); S. 369, 78th Cong., 1st Sess. (1943); 89 Cong. Rec. 5874 (1943) (Senate passage).

Although the Congress did not then enact a flag protection law, it did approve in 1942 a joint resolution "to codify and emphasize existing rules and customs pertaining to the display and use of the flag of the United States of America."<sup>32</sup> Patriotic societies had lobbied the Congress for this code since shortly after the First World War. When the code was first presented to the Congress in the 1920s, its proponents were careful to point out that it did not provide for penalties because it involved the kind of conduct that should not be mandated. "For instance," the resolution's sponsor testified, "you would not wish to arrest or to penalize anybody for not saluting the flag, perhaps, or for not saluting it in the proper way."<sup>33</sup> Intended to "provide an authoritative guide to those civilians who desire to use the flag correctly," H.R. Rep. No. 2047, 77th Cong., 2d Sess. (1942), the code as adopted by the Congress was only "recommendatory."<sup>34</sup>

The Congress's decision in 1942 to adopt only a recommendatory code on observance of the flag proved consist-

<sup>32</sup> Joint Resolution of June 22, 1942, ch. 435, 56 Stat. 377 (codified as amended at 36 U.S.C. §§ 171-78 (1982)).

<sup>33</sup> *Hearing on H.R.J. Res. 11 Before the House Comm. on the Judiciary*, 70th Cong., 1st Sess. 4-5 (1928) (Rep. Brand).

<sup>34</sup> *Id.* During World War I, the Congress had enacted temporary legislation concerning loyalty to government institutions that reflected a very different, but short-lived approach. The 1918 amendment to the Espionage Act of 1917 prohibited, "when the United States is at war," the uttering, printing, writing, or publishing of any "disloyal" language that was either about the form of government, Constitution, military forces, or flag of the United States, or that was intended to bring them "into contempt, scorn, contumely, or disrepute." Act of May 16, 1918, ch. 75, 40 Stat. 553, *amending* the Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219. Similar to the 1917 flag law for the District of Columbia, which prohibited the casting of contempt on the flag "by word," but unlike any subsequent federal legislation involving the flag, the 1918 amendment prohibited some verbal expression about the flag. In addition to ensuring that by its terms the prohibition was in effect only temporarily, the Congress precluded its application to future conflicts by repealing it in the legislation that terminated the war with Germany. Joint Resolution of March 3, 1921, ch. 136, 41 Stat. 1359, 1360.

ent with this Court's decision in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the next year. In invalidating a West Virginia regulation that required public school children to salute the flag and overruling its decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), the Court held that the government could not constitutionally compel an individual "to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks." *Barnette*, 319 U.S. at 633. Flag salute rules were "unique in the history of Anglo-American legislation . . . [f]or by this law the state seeks to coerce these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions." *Gobitis*, 310 U.S. at 601 (Stone, J., dissenting). In contrast, "[t]he action of Congress in making flag observance voluntary," *Barnette*, 319 U.S. at 638, reflected the same understanding of the appropriate limitations on legislation as this Court expressed in *Barnette*, namely, that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

5. DURING THE VIETNAM WAR THE CONGRESS ENACTED A FLAG DESECRATION STATUTE THAT PROHIBITED ONLY THE PHYSICAL DESECRATION OF THE FLAG, AND THIS COURT CORRESPONDINGLY NARROWED THE PERMISSIBLE REACH OF STATE FLAG DESECRATION STATUTES

After the Second World War, the question of national flag legislation lay dormant until the late 1960s when the Congress legislated in response to incidents of public flag burning in the United States and by American citizens in foreign countries.<sup>35</sup> Several factors contributed to the Congress's interest in "extending Federal protection to our national flag," *id.*, after having for years left the matter to the states. Members were convinced by correspondence from servicemen that "[t]he public act of dese-

cration of our flag tends to undermine the morale of American troops." 113 Cong. Rec. 16459 (1967) (Rep. Wiggins). Aware of burnings of the American flag in foreign countries, members were also concerned about the ability of the Department of State to demand apologies from other countries when nothing was done to prevent the flag's desecration at home. *Id.* at 16458 (Rep. Shriver). Because there were reports that some Americans were responsible for flag burnings in other countries, there was an interest in the Congress in prohibitions that would apply to United States citizens abroad.<sup>36</sup>

The Congress first considered proposals to extend nationwide the 1917 District of Columbia flag law by making it an offense anywhere "publicly [to] mutilate, deface, defile or defy, trample upon or cast contempt either by word or act," the flag.<sup>37</sup> Attorney General Ramsey Clark advised, however, that "[p]articular care should be exercised to avoid infringement of free speech. To make it a crime if one 'defies' or 'casts contempt \* \* \* either by word or act' upon the national flag is to risk invalidation. . . . Phrases prohibiting speech are in fact unnecessary to accomplish the goal of prohibiting direct acts of disrespect or desecration, because the remaining language comprehensively describes such acts."<sup>38</sup>

Accepting the Attorney General's advice, the Congress enacted a nationwide flag desecration law limited to "[w]hoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it."<sup>39</sup> The House and Senate

<sup>36</sup> See S. Rep. No. 90-1287, at 2, reprinted in 1968 U.S. Code Cong. & Admin. News at 2508.

<sup>37</sup> See *Desecration of the Flag: Hearings on H.R. 271 and Similar Proposals Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 90th Cong., 1st Sess. 1-27 (1967) (House bills).

<sup>38</sup> S. Rep. No. 90-1287, at 5, reprinted in 1968 U.S. Code Cong. & Admin. News at 2511.

<sup>39</sup> Pub. L. No. 90-381, 82 Stat. 291 (1968) (codified at 18 U.S.C. § 700 (1988) (amended 1989)).

<sup>35</sup> See S. Rep. No. 1287, 90th Cong., 1st Sess. 2, reprinted in 1968 U.S. Code Cong. & Admin. News 2507, 2508.

Judiciary Committees reported their belief that the law would withstand constitutional challenge because it

*does not* prohibit speech, the communication of ideas or political dissent or protest. The bill *does not* prescribe orthodox conduct or require affirmative action. The bill *does* prohibit public acts of physical dishonor or destruction of the flag of the United States. The language of the bill prohibits intentional, willful, not accidental or inadvertent public physical acts of desecration of the flag. Utterances are not proscribed.<sup>40</sup>

The law not only eliminated all reference to contempt of the flag "by words," but also eliminated the provision, which had been part of the 1917 District of Columbia statute and was prevalent in the states, that allowed for the punishment of an unlimited category of contemptuous acts; instead, the statute's ambit was limited to the specific acts listed. The Congress also did not carry forward the provision of the 1917 District of Columbia law, also prevalent in the states, which made it an offense to misuse the flag by placing any word or picture on it.<sup>41</sup>

In the six years after the enactment of the 1968 flag law, this Court reversed, or affirmed the reversal of, three convictions under older state flag laws. The Court's decisions—*Street v. New York*, 394 U.S. 576 (1969), *Smith v. Goguen*, 415 U.S. 566 (1974), and *Spence v. Washington*, 418 U.S. 405 (1974) (per curiam)—dealt with aspects of state laws (mirrored also in provisions of the 1917 District of Columbia law) which had *not* been carried forward into the nationwide desecration law that the Congress enacted

<sup>40</sup> H.R. Rep. No. 350, 90th Cong., 1st Sess. 3 (1967) (emphasis in original); S. Rep. No. 90-1287, at 3, reprinted in 1968 U.S. Code Cong. & Admin. News at 2509.

<sup>41</sup> In passing the 1968 act, the Congress deleted the mutilation provision from the District of Columbia flag law which, as modified, is codified in 4 U.S.C. § 3 (1988). It borrowed from the District of Columbia flag law and adopted as part of the new nationwide flag desecration law the broad definition of the flag contained in the District of Columbia law. Compare 18 U.S.C. § 700(b) (1988) with 4 U.S.C. § 3 (1988).

in 1968. This Court's constitutional rulings during that period, together with decisions which this Court let stand, effectively limited the permissible scope of state flag laws to the ambit of the new federal law, namely, proscriptions on the physical destruction of flags.

*a. This Court Overturned Convictions Not Based on Physical Harm to the Flag*

In *Street v. New York*, 394 U.S. 576, this Court invalidated a New York statute which made it an offense to "cast contempt" upon a flag "by words," terms which the Congress had excised in adopting the federal flag statute the prior year. Street, a World War II veteran, had been convicted under that statute when, in protest of the shooting of civil rights leader James Meredith, he burned a flag and then told a crowd that had gathered, "If they let that happen to Meredith we don't need an American flag." *Id.* at 579. Without reaching Street's broader contention that the law was unconstitutional because destruction of the American flag as a means of protest was protected expression, the Court held that the statute was unconstitutionally applied to him because it permitted him to be punished "merely for speaking defiant or contemptuous words about the American flag." *Id.* at 581. State courts conformed to *Street* by enforcing flag statutes only "insofar as [they] render[ ] criminal the *act* of any person who publicly mutilates, defaces or defiles the flag."<sup>42</sup>

Then, in *Smith v. Goguen*, 415 U.S. 566, this Court held that language in the Massachusetts flag statute that made it an offense to "treat[ ] contemptuously" the flag

<sup>42</sup> *People v. Burton*, 27 N.Y.2d 198, 201, 316 N.Y.S.2d 217, 218, 265 N.E.2d 66, 66 (1970) (affirming conviction for burning flag) (emphasis in original), *appeal dismissed*, 402 U.S. 991 (1971); *People v. Cowgill*, 274 Cal.App.2d 923, 926, 78 Cal. Rptr. 853, 855 (1969) (construing prohibition in California statute against "defiling" flag to apply only to "acts of desecration and disgrace" and affirming conviction for cutting up flag and sewing into a vest) (emphasis in original), *appeal dismissed*, 396 U.S. 371 (1970) (per curiam).

was unconstitutionally vague and affirmed the reversal of Goguen's conviction for wearing a flag sewn to the seat of his pants. The infirmity of the Massachusetts provision was that "it subjected [Goguen] to criminal liability under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." *Id.* at 578. As described above, the Congress in enacting the 1968 federal flag law determined not to carry forward into that law a similarly indefinite provision of the 1917 District of Columbia law that made it an offense to "cast contempt [by] act" upon the flag. This Court took note of that decision, observing that "nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags," *id.* at 581-82, and pointing out that the 1968 federal flag desecration statute "reflects a congressional purpose to do just that." *Id.* at 582 n.30 (legislative history of the 1968 federal law demonstrates a clear desire "to reach only acts that physically damage the flag"). Understanding that the Massachusetts court "necessarily limited the scope of the statute to protecting the physical integrity of the flag," Justice Blackmun, joined by Chief Justice Burger, would have upheld the constitutionality of Goguen's conviction. *Id.* at 591 (dissenting).

Shortly thereafter, in *Spence v. Washington*, 418 U.S. 405, this Court reversed a conviction under Washington's improper use statute for displaying a flag with a peace symbol temporarily attached in black tape to the flag. Like Washington, most states had barred the printing, painting, or affixing of words or pictures on flags since the early part of the century in response to the use of the flag in commercial advertising and for campaign banners, and Congress had included a misuse provision in the 1917 District of Columbia statute. Noting that no charge had been made under Washington's flag desecration statute and that Spence did not "permanently disfigure the flag or destroy it," the Court held that "in light of the fact

that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts, the conviction must be invalidated." *Id.* at 415. But just as *Street v. New York* and *Smith v. Goguen* had no direct bearing on the flag act passed by the Congress in 1968, neither was *Spence* applicable to the 1968 act, which contained no provision prohibiting the temporary affixing of materials to the flag.

*b. This Court Let Stand Convictions for Physical Harm to the Flag*

The gradual pruning of problematic provisions of state flag laws culminated in this Court's decision to decline review for want of a substantial federal question state court decisions upholding convictions for physical harm to the flag.<sup>43</sup> In *State v. Farrell*, 209 N.W.2d 103 (Iowa 1973), the Iowa Supreme Court had assumed that a woman who participated in flag burning as part of a student demonstration to protest the Indo-China War and the presence of the R.O.T.C. on campus had engaged in protected expressive activity, but nevertheless had affirmed her conviction under Iowa's flag statute, which it limited to physical acts of flag desecration. On appeal, this Court remanded for further consideration in light of its decision in *Spence*; Chief Justice Burger, and Justices White, Blackmun, and Rehnquist would have affirmed the conviction without further briefing and oral argument. 418 U.S. 907 (1974). On remand, the Iowa Supreme Court concluded that *Spence* was distinguishable because it concerned the "nonmutilative removable taping of a peace symbol on a flag then displayed on defendant's privately occupied premises." 223 N.W.2d 270, 271 (Iowa

<sup>43</sup> The Court also had declined to review a federal court decision that the 1968 federal flag law was applied constitutionally to an individual who had torn a flag. *Joyce v. United States*, 454 F. 2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972). Other federal courts had upheld convictions under the 1968 federal law for flag burning. See *United States v. Crosson*, 462 F. 2d 96 (9th Cir. 1972); *United States v. Ferguson*, 302 F. Supp. 1111 (N.D. Cal. 1969).

1974) (emphasis omitted). In contrast, the Iowa case “unquestionably involved the mutilation by burning of a United States flag in a public place.” *Id.* The Iowa Supreme Court reaffirmed the conviction, and this Court dismissed the appeal from that judgment for want of a substantial federal question. 421 U.S. 1007 (1975).

In a parallel disposition, an Illinois appellate court had affirmed the convictions for “publicly mutilating a flag” of three individuals who burned a flag to protest against the invasion of Cambodia and the deaths at Kent State. *People v. Sutherland*, 9 Ill. App. 3d 824, 292 N.E.2d 746 (1973). On appeal, this Court remanded for reconsideration in light of its decisions in *Smith v. Goguen* and *Spence*; Chief Justice Burger, and Justices White, Blackmun, and Rehnquist again stated that they would have affirmed the convictions without further briefing and oral argument. 418 U.S. 907 (1974). On remand, the Illinois court observed that, in contrast to *Spence*, the facts before it implicated a legitimate government interest. The court distinguished *Smith v. Goguen* on the ground that “[n]o allegation of physical desecration was made there as in the case at bar.” The court reaffirmed the convictions for flag burning, 29 Ill. App. 3d 199, 329 N.E.2d 820 (1975), and this Court dismissed the appeal from that decision for want of a substantial federal question. 425 U.S. 947 (1976).

6. THE FLAG PROTECTION ACT OF 1989 WAS ENACTED IN RESPONSE TO THIS COURT'S DECISION IN *TEXAS V. JOHNSON* TO ASSURE THAT THE FEDERAL FLAG LAW IS CONTENT-NEUTRAL

As other state courts had done in the early 1970s, the Texas courts had narrowed the state flag desecration statute, which had been similar to that of most other states, *Delorme v. State*, 488 S.W.2d 808 (Tex. Cr. App. 1973) (enforcing statute as if “word or” from the phrase “cast contempt upon, either by word or act” had been omitted), and had affirmed convictions for physical destruction of the flag, *Deeds v. State*, 474 S.W.2d 718 (Tex. Cr. App. 1971) (flag burning). This Court had dismissed for want of a substantial federal question an appeal from a conviction

under the Texas statute so narrowed. *Van Slyke v. Texas*, 418 U.S. 907 (1974).

In 1973, however, Texas replaced that statute with one that had been suggested in a draft of the American Law Institute's Model Penal Code. That draft had proposed for consideration a criminal code section entitled “Desecration of Venerated Objects” and defined “desecration” as “physically mistreating in a way that the actor knows will seriously offend persons likely to observe or discover his action.” American Law Institute, Model Penal Code, Tentative Draft No. 13, at 39, § 250.4 (1961).<sup>44</sup> It was the law that Texas based on this draft, which differed considerably from the 1968 federal flag law and the general body of state flag laws, that this Court held in *Texas v. Johnson*, 109 S.Ct. 2533 (1989), could not be applied constitutionally to an individual who burned a flag as part of a political demonstration.

In *Texas v. Johnson*, this Court considered the application of Texas's venerated objects statute to Gregory Johnson's burning of a flag as the culmination of a political demonstration during the 1984 Republican National Convention. The Court observed that under the Texas statute “[w]hether Johnson's treatment of the flag violated Texas law . . . depended on the likely communicative impact of his expressive conduct,” and concluded that “Johnson's political expression was restricted because of the content of the message he conveyed.” 109 S.Ct. at 2543. Accordingly, the Court applied its “most exacting scrutiny,” *id.*, and concluded that Texas's interest in furthering the state's own view that the flag stands for “nationhood and

<sup>44</sup> The final version of the Model Penal Code, which the drafters recognized “mark[ed] a significant departure from prior law,” defined desecration as “physically mistreating in a way that the actor knows will outrage the sensibilities of persons likely to observe or discover his action.” American Law Institute, II Model Penal Code and Commentaries 411, 415 (1980). A few states have adopted this final version. *E.g.*, Colo. Rev. Stat. §§ 18-9-113, 18-11-204 (1986); Kan. Stat. Ann. § 21-4111 (1988); Haw. Rev. Stat. § 711-1107 (1988); Del. Code Ann. tit. 11, § 1331 (1987).

national unity" was not sufficiently compelling to outweigh Johnson's first amendment interests. *Id.* at 2548. In reaching this conclusion, the Court observed that "[t]he Texas law is . . . not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others." *Id.* at 2543. In this regard, the Court took particular note of Justice Blackmun's dissenting opinion in *Smith v. Goguen*. *Id.* at 2543 n.6.

Concerned with the possible impact of *Texas v. Johnson* on the existing federal flag statute, members of Congress immediately began to explore ways to protect the flag.<sup>45</sup> Throughout a four-month period in 1989, members of the Congress, with the input of scholars, witnesses, and the public, considered not only how to craft a statute consistent with *Texas v. Johnson*, but also considered once again the nation's interest in preserving the physical integrity of the flag.

Based on analysis of this Court's first amendment decisions, the bills reported by the Judiciary Committees "respond[ed] to . . . *Texas v. Johnson* by amending the current Federal flag statute to make it content-neutral: that is, the amended statute focuses exclusively on the conduct of the actor, irrespective of any expressive message he or she might be intending to convey."<sup>46</sup> They provided that, "[as] amended, the Federal flag law would no longer require the actor to have 'cast contempt' or, for that matter, to have acted 'publicly.' Prosecution under the amended law would not in any way depend on the re-

<sup>45</sup> See *Statutory and Constitutional Responses to the Supreme Court Decision in Texas v. Johnson: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989); *Hearings on Measures to Protect the Physical Integrity of the American Flag: Hearings Before the Senate Comm. on the Judiciary*, 101st Cong., 1st Sess. (1989).

<sup>46</sup> H.R. Rep. No. 231, 101st Cong., 1st Sess. 2 (1989).

action of observers to the conduct."<sup>47</sup> The committees also were attentive to the concern over the broad definition of the flag contained in the 1968 federal statute and limited it to assure that only actual flags, and not designs or articles resembling them, came within the statute's reach.<sup>48</sup>

While analyzing the doctrinal implications of *Texas v. Johnson*, members of the Congress also considered the purpose in preserving the symbol and the nature of the harm that flows from its destruction. From the testimony of witnesses and the statements of members it was evident that the Congress viewed its purpose as more inclusive than Texas's goal of furthering the state's own view of the flag. As Representative Edwards summarized, "The flag is worthy of protection not because it represents any one idea. . . . As the testimony of witnesses indicated, the flag means different things to different people. The bill does not foster any one view of what the flag represents." 135 Cong. Rec. H5502 (daily ed. Sept. 12, 1989). It also was evident that the Congress was not concerned, as Texas had been, with harm that results from expression of an offending message, but rather with harm caused by destruction of the flag itself. See S. Rep. No. 101-152, at 4, 1989 U.S. Code Cong. & Admin. News at 613. The bills reported by the Judiciary Committees reflected this understanding by protecting "the physical integrity of the flag

<sup>47</sup> S. Rep. No. 152, 101st Cong., 1st Sess. 10, reprinted in 1989 U.S. Code Cong. & Admin. News 610, 619. On the floor, the Senate rejected an amendment to limit the flag protection statute to public acts of physical harm. 135 Cong. Rec. S12655 (daily ed. Oct. 5, 1989). In opposing the amendment, Senator Joseph R. Biden, Jr., emphasized the importance of protecting the physical integrity of the flag in all circumstances, not just in those in which destruction of the flag would have a "communicative impact." *Id.* at S12620 (daily ed. Oct. 4, 1989).

<sup>48</sup> See Pub. L. No. 101-131, 103 Stat. 777 (limiting to flags "in a form that is commonly displayed"); H.R. Rep. No. 101-231, at 11 & n.12 (explaining that the statute excludes from coverage such items as photographs of flags or items decorated with images of the flag).

in all circumstances." *Id.* at 13, 1989 U.S. Code Cong. & Admin. News at 622.

Perceiving the Flag Protection Act as a way, consistent with the first amendment, of "recogniz[ing] the deeply held feelings of a vast majority of citizens for the physical integrity of all American flags," the House overwhelmingly passed the measure on September 12, 1989.<sup>49</sup> The Senate then passed it on October 5, 1989, after adding to the list of prohibited conduct.<sup>50</sup> When the bill returned to the House for final passage on October 12, 1989, Representative Brooks reminded the House of the "intent[ion] to make this provision of Federal criminal law 'content neutral.' It is the act of harming the physical integrity of the flag, rather than any message the actor might be attempting to convey, that is to be punished by 18 U.S.C. 700 as we are amending it." <sup>51</sup>

Through the Flag Protection Act, tailored to address only harm to the physical integrity of the flag, the Congress concluded a process of narrowing the scope of the model law that the American Flag Association had circulated at the turn of the century. That narrowing process had commenced with the Attorney General's advice in 1968 to limit the scope of the federal statute to conduct, and was continued by the courts, which invalidated provisions of state laws or narrowly construed them to apply only to harm to the physical integrity of the flag. In the Flag Protection Act of 1989, the Congress returned flag

<sup>49</sup> 135 Cong. Rec. H5502, H5562 (daily ed. Sept. 12, 1989) (remarks of Rep. Edwards and passage).

<sup>50</sup> The Senate added two activities to the list of prohibited conduct: "physically defiles" and "maintains on the floor or ground." During the debate on the amendment on "physically defiles," it was emphasized that, in keeping with the other enumerated acts, defilement would have to be physical to come within the act's reach. *See, e.g.*, 135 Cong. Rec. S12618 (daily ed. Oct. 4, 1989) (remarks of sponsor Sen. Wilson).

<sup>51</sup> 135 Cong. Rec. H6991, H6997 (daily ed. Oct. 12, 1989) (remarks of Rep. Brooks and final passage). The bill became law without the President's signature on October 28, 1989.

desecration legislation to the core concern reflected in a number of the first flag statutes adopted following the violence during the 1896 campaign—protecting the physical integrity of the flag without regard to the actor's purpose.

#### 7. THE HISTORICAL DEVELOPMENT OF THE FLAG PROTECTION ACT OF 1989 DEMONSTRATES THAT THE ACT PROTECTS THE FLAG IN A CONSTITUTIONALLY PERMISSIBLE MANNER

For nearly a century, since Pennsylvania became the first state to act legislatively in response to violence against the flag during the 1896 presidential campaign, the destruction of the United States flag has been viewed as conduct that causes serious harm to the nation, irrespective of the views of particular actors. The Flag Protection Act of 1989 continues the sustained nationwide effort to prevent that harm, and does so in a way that is respectful of first amendment interests. As we indicated at the beginning of this argument, our brief is provided for the Court's consideration in conjunction with those of the appellant and other supporting amici and, rather than reiterate arguments advanced elsewhere, we leave to those briefs the full articulation of the manner in which the Act comports with the first amendment decisions of this Court.<sup>52</sup> In this concluding section, we will

<sup>52</sup> Our briefs in district court presented an analysis of the law that parallels the amicus brief submitted to this Court by Senator Biden, Chairman of the Senate Committee on the Judiciary. We adhere to that analysis, namely that the Flag Protection Act is content-neutral, that it serves a significant governmental interest, and that it allows ample alternative means of expression.

In our briefs below, we also advanced an argument supportive of the appellant's argument that some expression is not entitled to full first amendment protection. In this regard, we argued that it is worth recalling how the doctrine which equates some conduct with speech evolved. The doctrine's origin is usually credited to *Stromberg v. California*, where the Court overturned a statute that permitted a conviction for the display of a red flag in circumstances that might include "peaceful and orderly opposition to government." 283 U.S. 359, 369 (1931). It has been traced through *Brown v. Louisiana*, which involved a silent demonstration in a segregated library. 383 U.S. 131, 139 (1966) (demonstrators "sat and stood in the room, quietly, as monuments of

Continued

draw together several themes from the nation's experience with flag protection legislation in aid of the Court's consideration of the doctrinal arguments developed more completely in other briefs.

At the threshold, the 1989 flag law should be assessed in the context of its predecessor enactments. The 1989 law modifies the 1968 flag law. That law, in turn, was modeled after portions of the 1917 flag law for the District of Columbia, which was drawn in turn from the American Flag Association's 1900 model act. The model act was, indeed, the model for a large number of state enactments, and also for the uniform flag law promulgated by the Commissioners on Uniform State Laws in 1917. Although the Congress has narrowed the reach of its flag law from the version that most states adopted, the Congress has always perceived federal and state law on the

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protest against the segregation of the library"). *Tinker v. Des Moines Independent Community School District* applied the doctrine to wearing armbands in circumstances "entirely divorced from actually or potentially disruptive conduct by those participating." 393 U.S. 503, 505 (1969). Then, in *Spence v. Washington*, the doctrine was applied to the affixing of a temporary peace symbol on a flag by a student whose manner the Court said "can fairly be described as gentle and restrained." 418 U.S. at 414 n.10. Only in *Street v. New York* and *Texas v. Johnson* has the Court protected expression associated with acts of destruction, but in *Street* protection was provided because the defendant may have been convicted for his words and in *Texas v. Johnson* because an element of the state crime was whether the defendant's action caused serious offense to others. This Court has written that "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

Finally, with respect to the argument of the Speaker and Leadership Group of the House of Representatives that the government has a sovereignty interest in the flag, we view the historical discussion in support of that argument as complementary to the discussion in this brief, and one which helps to explicate why the very first House report in 1890 in support of protective legislation described the flag as "the symbol of our national existence, power, and sovereignty." H.R. Rep. No. 51-2128, *supra* pp. 7-8, at 1.

protection of the flag to serve common objectives. S. Rep. No. 90-1287, at 2, 1968 U.S. Code Cong. & Admin. News at 2508 ("State jurisdiction in this matter should not be displaced."); H.R. Rep. No. 90-350, *supra* n.40, at 1 ("the national emblem should be given concurrent Federal protection"). An understanding of the federal flag law requires, therefore, an understanding of the objectives of the flag protection movement that achieved extraordinary success in the states at the turn of the century.

The flag protection movement that began to sweep the nation at the end of the last century had nothing to do with the suppression of dissent. Concern about the flag had mounted for years in response to commercial exploitation of it, but the rapid enactment of protective laws in the states followed from violence during the 1896 campaign in which Democrats and Republicans, "each assuming that they alone represented the patriotism of the country," *see supra* p. 10, trampled each other's flags or shot at them. The appellees in these cases are deeply concerned about a range of contemporary issues—laws on abortion and homosexuality (J.A. 47), a strike at an aircraft plant (J.A. 75), the plight of the homeless (J.A. 77), and others—but flag laws are not directed at such protests. Indeed, from the outset, proponents of flag legislation made clear that their purpose was "NOT to make our citizens loyal," but "TO REGULATE the actions of those who [destroyed flags] without a disloyal thought, unthinkingly." *See supra* p. 11.

The society's interest in protecting the integrity of the flag has remained essentially unchanged since concerns about commercial exploitation of it were first raised in the late nineteenth century. Just as Senator William S. Cohen spoke of the flag in debate last October as "unique, a special emblem of our principles and ideals, and of our Nation's struggle for freedom," 135 Cong. Rec. S12582 (daily ed. Oct. 4, 1989), in 1890 the first House report on flag protection urged that the flag be protected because "[i]t is the emblem of freedom and equality. . . . It is a

reminder of American fortitude, courage, and heroism, and of the suffering and sacrifices on land and sea which have been endured for its preservation and for the preservation of the country it represents." *See supra* pp. 7-8.

In large part the debate about flag legislation has not been whether the government has an interest in preserving the flag as a national symbol, but about the strength of that interest and whether there is any danger to it if the flag's destruction is not prohibited. As to the strength of the interest, it is demonstrated by the sustained effort for decades "to keep our flag sacred and free from any alteration or desecration whatever." *1900 Circular, supra* n.15, at 16. As to whether there is danger to the effectiveness of the flag as a symbol if subject to uncontrolled violence against it, any judgment is likely to be subjective. Nevertheless, our nation's history has demonstrated that the flag is a potent symbol of the right of the people to petition peacefully for the redress of grievances.<sup>53</sup> That being so, among the principal actors in our government of separated powers, certainly legislators who partake regularly in public debate are well positioned to assess the danger to civic discourse that may arise when violence against that symbol threatens "to fill the marketplace of ideas with the sound of thudding fists." *Joyce v. United States*, 454 F.2d at 987-88.

It is of course a matter of fair debate whether legislation to protect the flag is needed. Attorney General Clark, even as he advised the Congress on steps it should take to write a constitutional flag law in 1968, asked the Congress to consider whether the need for one had been demonstrated, and expressed his doubts. Nevertheless, he firmly recognized that, "[w]hether a Federal criminal

<sup>53</sup> A few photographs from this century make that point. As suffragists marched down Pennsylvania Avenue in 1913 to protest the denial of the right to vote, they carried the United States flag aloft, "through a dense mob of hostile humanity." *An Illustrated History of The City of Washington* 362 (T. Froncek ed. 1977). In 1965, the flag was carried on the march from Selma to Montgomery. J. Williams, *Eyes on the Prize* 250-51 (1987).

statute is the proper redress for the injury inflicted on the Nation when the flag is burned and whether it would serve as a needed deterrent against further transgressions is a question for the Congress." S. Rep. No. 90-1287, at 4, 1968 U.S. Code Cong. & Admin. News at 2510. This Court in *Halter* believed that the fact that more than half of the states had adopted statutes similar to Nebraska's was "of such significance as to require us to pause before reaching the conclusion that a majority of the States have, in their legislation, violated the Constitution of the United States." 205 U.S. at 40. The Congress has resolved the question that Attorney General Clark recognized was for it to decide, and nearly all states have proscribed the physical destruction of the flag without the language used in Texas's singular statute.

The century-long history of flag legislation is also instructive about the manner in which the Flag Protection Act has been crafted to achieve its objectives without trenching on first amendment values. The states took two paths in the immediate aftermath of the 1896 campaign. One utilized legislation that, apart from restrictions on the use of the flag in advertising, dealt solely with physical assaults on flags. The other also proscribed defiance of the flag or, without limiting definitions, contempt by words or acts on the flag. Many of the states and the Congress, in 1917 for the District of Columbia, chose the second path.

In the Flag Protection Act of 1989, the Congress has completed a process of evolution and has come to focus exclusively on protecting the physical integrity of the flag in all circumstances. First, in World War II, while states sought to compel loyalty to the flag, the Congress, recognizing that such loyalty could not be coerced, enacted only recommendatory legislation for flag ceremonies, a decision acknowledged approvingly by this Court in *Barnette*. Then, in enacting nationwide flag protection legislation in 1968, the Congress excised from its statute several expansive provisions found in state flag laws, includ-

ing restrictions on verbal expression and vague terms describing the prohibited conduct. The wisdom of those actions was confirmed by this Court's flag decisions over the next several years in which the Court invalidated a number of provisions of state flag laws. Most recently, when this Court found unconstitutional Texas's flag legislation that singled out offending views for punishment, the Congress quickly acted to tailor its law.

As a result of the Congress's attentive narrowing of flag legislation, the federal law now addresses only conduct that harms the interest recognized since 1896 by state legislators, the Congress, and members of this Court, namely, protecting the physical integrity of the flag. As a result, the Act leaves available limitless alternative means of communication, many of which involve the flag. A person may denounce the flag, fly it upside down or in inferior positions, or display it with a variety of temporary symbols attached to it. Although some individuals may prefer destruction of the flag to communicate their ideas, the Court has never accepted the proposition, as long as the government's regulation is viewpoint neutral, "that people who want to propagandize protests or views have a constitutional right to do so whenever and *however* and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 48 (1966) (emphasis added). The Act limits only activity that is the source of the harm the Congress has identified, without restricting expressive activity that does not cause that harm.

# CONCLUSION

The judgments of the district courts should be reversed.

Respectfully submitted,

MICHAEL DAVIDSON,  
*Senate Legal Counsel.*

KEN U. BENJAMIN, Jr.,  
*Deputy Senate Legal Counsel.*

MORGAN J. FRANKEL,  
*Assistant Senate Legal Counsel.*

CLAIRE M. SYLVIA,  
*Assistant Senate Legal Counsel.*

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